SUPREME COURT OF THE UNITED STATES.

December Term, 1863.

No. 183.

JAMES C. STONE, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

ARGUMENT FOR THE UNITED STATES.

[redacted]

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1537

IN THE SUPREME COURT OF THE UNITED STATES.

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STATEMENT OF THE CASE FOR THE UNITED STATES.

In this case the United States, on the 27th of August, 1862, filed a bill in equity against John Conner, Ne-con-he-con, and Henry Tiblow, members of the Delaware tribe of Indians in Kansas, and James C. Stone, to obtain a decree to declare null, void, and of no effect, and to deliver up for cancellation, patents issued by the United States to the said John Conner, Ne-con-he-con, and Henry Tiblow, respectively, for certain lands therein described, which those persons, it was alleged, had conveyed to James C. Stone.

The following is believed to be an accurate statement of the facts and treaty stipulations upon which the questions in the case are presented:

Delaware treaty, October 3, 1818.

By treaty of the 3d of October, 1818, (7 Statutes at Large, 188,) the Delaware Indians ceded to the United States all their claim to land in the State of Indiana, where they then resided, in consideration of which the United States agreed to provide for them, "a country to reside in upon the west side of the Mississippi, and to guarantee them peaceable possession of the same."

Supplementary article, September 24, 1829.

The Delawares having removed, in accordance with the foregoing stipulation, to the James fork of the White river, in the State of Missouri, a supplementary article to the said treaty of 1818 was made on the 24th of September, 1829, (7 Statutes at Large, 327,) by which, after reciting the stipulation of the said

treaty, and declaring the willingness of the Delawares to remove from that country to the country selected in the fork of the Kansas and Missouri rivers, as recommended by the government for the permanent residence of the whole Delaware nation, it was agreed as follows:

"That the country in the fork of the Kansas and Missouri rivers, extending up the Kansas river to the Kansas line, and up the Missouri river to Camp Leavenworth, and thence by a line drawn westwardly, leaving a space ten miles wide north of the Kansas boundary line for an outlet, shall be conveyed and forever secured by the United States to the said Delaware nation as their permanent residence;" and the quiet and peaceable possession and undisturbed enjoyment of the same was guaranteed to them against all claims.

It was further agreed that the supplementary article should be concluded in part only at that time, and that a deputation of a chief or warrior from each town, with their interpreter, should proceed with the agent to explore the country more fully, and if they approved of it they should sign their names, &c. Afterwards, on the 24th of October, 1829, the chiefs, having examined and approved of the country, signed their names.

Senate resolution of May 29, 1830.

The Senate resolution of May 29, 1830, ratifying this supplementary article, (Record, page 56,) provided that the President should, with all convenient despatch, employ a surveyor to run the lines of the country thereby granted to the Delawares, to establish certain and notorious landmarks, accurately and permanently to distinguish the boundaries of the said granted country, and of the said outlet reserved, in the presence of an agent of the Delawares, and to report to the President his proceedings, with a map or draught of the granted country and outlet, and that when the President was satisfied that the proceedings had been concurred in and approved by the agent of the Delawares, he should also approve of the same by his signature and seal of office, and cause a copy to be filed among the archives of the government, and one to be delivered to the agent of the Delawares, and which should thereafter be binding and conclusive upon the parties to the treaty.

Camp Leavenworth located, 1827.

More than two years prior to this supplemental treaty, Colonel Leavenworth, of the third infantry, by orders from the Adjutant General's office at Washington, had selected a site for "a permanent cantonment" on the right bank of the Missouri river, eighteen or twenty miles above the mouth of the Little Platte, which selection was approved September 19, 1827.—(Record, pages 48, 49.) From that time that site has always been in the continued and undisturbed possession and occupancy of the United States as a military post, except that no troops occupied the cabins thereon from June 5 to November 8, 1829, and is the place mentioned in the supplemental article above mentioned as "Camp Leavenworth," and now called Fort Leavenworth.

McCoy's survey, 1830.

Pursuant to the Senate resolution ratifying the supplemental article, the Rev. Isaac McCoy was selected to make the survey of the lands granted to the Delawares, under instructions from the War Department of June 30, 1830.—(Record, pages 60, 61.) Mr. McCoy proceeded to make the survey in the summer of 1830, and made report thereof in substantial compliance with his instructions and the Senate resolution.—(Record, pages 57, 58.) A map of his survey is in evidence, marked "F," and entitled "Delaware lands, surveyed in 1830."

In his report Mr. McCoy says: "In the treaty with the Delawares of September 24, 1829, no provision was made for a military reserve at Cantonment Leavenworth. It has been thought desirable that a tract of six miles on the Missouri river, and four miles back, should be secured for this object. Accordingly, the survey about the garrison has been made with a view to such a reservation, as will be seen by reference to the plat. In this arrangement the Delaware chief, to whom the whole was fully explained on the ground, has cordially acquiesced."—(Record, pages 57, 58.)

This survey, thus authoritatively made, was, so far as the evidence shows, the only one by which the United States designated and set apart the lands granted to the Delawares by the supplemental article of 1829, and it has always been accepted and treated as fixing the boundaries of the grant, not only by the United States, but by the Delawares, who, when it was made, were present in the person of their agent, Captain Quick, and who took possession of and held the country so surveyed according to those boundaries.

By this survey, then, the tract of land on which Camp Leavenworth then stood, designated on McCoy's map, south 87° west, four miles, and north 3° west, three miles, and adjoining the Missouri river, was actually excluded from the lines of the Delaware lands, and never formed a part of those lands.

This survey was also the first official designation on the ground of the exterior lines of the land appropriated and reserved by the government for military purposes at that point.

Johnson's survey, 1839.

The next survey of the military tract about Fort Leavenworth was made by Captain A. R. Johnson, in 1839, under the orders of the commanding officer, and a map of that survey was made and duly filed in the War Department. By this map, the southern boundary of the military tract appears as originally fixed by Isaac McCoy, in 1830, but the western boundary was changed by taking the natural boundary, Salt creek, instead of the geographical line run by McCoy, which crossed that stream.—(See agreement, Record, page 31.)

Used by troops for farming, &c.

It appears, both by the bill (page 3,) and answer (page 9,) that the land within these surveys, extending far beyond the limits which the defendant now claims as the true extent of Camp Leavenworth, has for many years past been used by the military authorities at that post for farming, pasturage, &c., and it

does not appear, by any competent evidence, that the Indians ever objected to such use, or that the military authorities ever paid them rent therefor, the testimony of John G. Pratt being utterly inadmissible for that purpose.—(Record, page 84.)

Hunt's survey, September 27, 1854.

Evidently under the temporary misapprehension that the boundaries of the reservation had never been designated on the ground, the Secretary of War, in August, 1854, ordered a survey to be made and a reservation laid off for military purposes at Fort Leavenworth; (Record, page 51;) which survey was made by Captain Hunt, September 27, 1854, (see map of Captain Hunt,) and approved by the Secretary of War, and, (10th October, 1854) the land therein set off directed by the President to be reserved for military purposes.—(Record, pages 41, 42, and 51, 52.) This survey also followed the southern boundary line run by McCoy, in 1830, but Captain Hunt thought it proper to limit this line so as to exclude a part of the land embraced in the original reservation of 1830, and in the survey by Captain Johnson in 1839. In his report, (Record, page 52,) Captain Hunt, after stating that the line is run with McCoy's southern boundary, says: "but as the reserve as formerly laid out was much larger than I conceived necessary under my instructions, I only went out $2\frac{3}{4}$ miles on this line, and thence along the top of the bluffs as near as I could, to make a good boundary to the Missouri river."

Delaware treaty, May 6, 1854.

By treaty of the 6th of May, 1854, ratified 11th July, 1854, (10 Stat., 1048,) the Delaware Indians ceded, relinquished, and quit-claimed to the United States all their right, title, and interest, in and to their country lying west of the State of Missouri, and situate in the fork of the Missouri and Kansas rivers, which is described in the article supplementary to the treaty of October 3, 1818, executed in part on the 24th of September, 1829; and finally concluded on the 19th of October, 1829; and also all their right, title, and interest, in and to the "outlet" mentioned and described in said supplementary article, excepting that portion of said country sold to the Wyandot tribe of Indians by instrument, &c., of July 25, 1848; "and also excepting that part of said country lying east "and south of a line beginning at a point on the line between the land of the "Delawares and the half-breed Kansas, forty miles, in a direct line, west of the "boundary between the Delawares and Wyandotts; thence north, ten miles; thence "in an easterly course to a point on the south bank of Big Island creek, which "shall also be on the bank of the Missouri river, where the usual high-water line "of said creek intersects the high-water line of said river."

By the second and third articles of this treaty, the United States agrees to have the ceded country, except the outlet, surveyed and offered for sale, and to pay the Delawares all the moneys received from the sales, &c. The 11th article provides that when the Delawares desire it, the President may cause the country reserved for their permanent home to be surveyed in the same manner as the ceded country is to be surveyed, and may assign such uniform portions

to each person or family as shall be designated by the principal men of the tribe.

The effect of this treaty was to reduce "the permanent home" of the Delawares to the land embraced within the boundaries above quoted.

In making the surveys under the treaty of May 6, 1854, the lands between the red and blue lines on the map marked "H"—*i. e.* the lands between the western line of McCoy's survey of 1830 and the western line of Hunt's survey of 1854—were surveyed and sold, by order of the President, for the benefit of the Delawares.—(Record, page 31.) But in making those surveys, the western line of Hunt's survey, and the southern line of both McCoy's and Hunt's surveys, as far west as Hunt ran, were accepted as the true lines of the military reservation, and no surveys under the treaty were made therein.

Delaware treaty, May 30, 1860.

The next treaty, and that under which the questions in this case more directly arise, was made on the 30th of May, 1860, and ratified August 22, 1860. —(12 Stat., 1129.)

The first article recites that by the treaty of May 6, 1854, there was reserved as a permanent home for the said tribe that part of their country lying east and south of a line, &c., (following the description of the boundaries above extracted from that treaty, and designated by quotation marks.) And by the 11th article of said treaty, it was stipulated that at any time thereafter when the Delawares desired it, &c., the President might cause the country reserved for their permanent home to be surveyed, &c. "The Delawares having represented to the government that it is their wish that a portion of the lands reserved for their home may be divided among them in the manner contemplated by the 11th article of the treaty aforesaid, it is hereby agreed, by the parties hereto, that the said reservation shall be surveyed, as early as practicable after the ratification of these articles of agreement and convention, in the same manner that the public lands are surveyed; and to each member of the Delaware tribe there shall be assigned a tract of land containing eighty acres, to include in every case, as far as practicable, a reasonable portion of timber, to be selected according to the legal subdivisions of survey."

Article second provides for the division and assignment in severalty of the lands among the Delawares, in a compact body, under the direction of the Secretary of the Interior, and for the issue of certificates to them, &c.

Article third recites the desire of the Delawares that the Leavenworth, Pawnee, and Western Railroad Company shall have the preference of purchasing the remainder of their lands, "after the tracts in severalty, *and those for the special objects hereinafter named, shall have been selected and set apart*," for a sum appraised as the value of the lands; &c.

Article fourth provides for the allotment of eighty acres to certain Delawares.

Article fifth provides for certain reservations for specified purposes.

Seventh article.

Article seventh is as follows:

"In consideration of the long and faithful services of the chiefs of the Delaware nation, and of their interpreter, who is also a member of the nation, it is further agreed that the said chiefs and interpreter shall have allotted to each a tract of land, to be selected by themselves, and shall receive a patent in fee simple therefor from the President of the United States, viz: John Connor, principal chief, six hundred and forty acres; Sar-cox-ie, chief of the Turtle band, three hundred and twenty acres; Rock-a-to-wha, chief of the Turkey band, three hundred and twenty acres; Ne-con-he-con, chief of the Wolf band, three hundred and twenty acres; and Henry Tiblow, interpreter, three hundred and twenty acres; the lines of each tract to conform to the legal subdivisions of survey. It is further agreed that, from the money as paid the Delaware tribe of Indians, in accordance with article number ten of this treaty, the chiefs of said tribe of Indians shall appropriate one thousand five hundred dollars as the annual salary of the councilmen of the said tribe of Indians."

Grants of Connor, &c., to Stone.

By an instrument dated January 14, 1861, acknowledged October 9, 1861, "John Connor, principal chief of the Delaware tribe of Indians, living on the Delaware Indian reservations," granted, &c., "all his right, title, and interest to a float or tract of land specified in the seventh article of the treaty, &c., concluded May 30, 1860, ratified August 22, 1860," to James C. Stone. After reciting that he had never yet made the selection of said tract of land, or located it on any part thereof, it authorized said Stone, his heirs or assigns, to locate or select the same, and do all in connexion therewith that he, the said Connor, could do, and authorized the President to issue the patent in the name of James C. Stone.—(Record, p. 17.)

By similar instruments, dated October 9, 1861, Ne-con-he-con and Henry Tiblow granted, &c., to said James C. Stone their respective "floats or head-rights," under the said treaty, with like authority to select and locate the same, &c.—(Record, pp. 19, 20.)

Commissioner of Indian Affairs to Commissioner of the General Land Office, November 8, 1861.

By letter of November 8, 1861, the Commissioner of Indian Affairs informed the Commissioner of the General Land Office that the Secretary of the Interior had "decided that all that part of what has heretofore been known as the military reserve at Fort Leavenworth, in Kansas, lying south of a direct line drawn westwardly from Cantonment (Fort) Leavenworth to a point ten miles north of the northeast corner of the old Kansas line, and not heretofore surveyed, belonged to the Delawares," and had "ordered the same to be surveyed," and he requested that the necessary order might issue for that survey.—(Record, p. 23.)

Order to survey disputed land, November 9, 1861.

The Commissioner of the General Land Office, by letter of November 9, 1861, directed the surveyor general of Kansas to cause the said survey to be made in accordance with the foregoing request, (Record, pp. 21, 22,) which survey is shown by the map marked M.

This survey was directed and made upon the assumption that the survey and reservation of McCoy in 1830, the survey of Captain Johnson in 1839, and the survey of Captain Hunt in 1854, and the formal reservation made thereunder by the President of the United States, were void and of no effect in excluding from the grant to the Delawares, and setting apart as a reserve for military purposes, the land embraced in it. It was made after the survey of what had been theretofore understood to be the lands held in trust by the United States for the Delawares. The Commissioner of the General Land Office, in his directions to the surveyor general of Kansas (Record, pp. 21, 22) to make the survey, refers to it as "the survey of that part of the Delaware trust lands *which have not been heretofore surveyed*, owing to their having been included in the survey of the military cantonment and that part of the Fort Leavenworth military reservation under the President's order of October 10, 1854."

It further appears by the letter of Mr. Dole, the Commissioner of Indian Affairs, to J. C. Stone, (Record, p. 86,) that, in ordering the survey of the land within the military reservation, the Secretary of the Interior overruled the contrary decision of his predecessor, Moses Kelly, esq.

Letter of Commissioner of Indian Affairs, December 31, 1861.

On the 31st of December, 1861, the Commissioner of Indian Affairs reported to the General Land Office three selections as having been made under the provisions of the seventh article of the Delaware treaty of 1860, in favor of John Connor, Ne-con-he-con, and Henry Tiblow, stating that said selections had been *approved*, and desiring the patents transmitted to the Indian Office for delivery, which was done on the 4th of January, 1862.—(Record, p. 35.)

Patents to Connor, &c., January 3, 1862.—*Conveyed to Stone, February* 12, 1862.

These patents, dated January 3, 1862, signed by the President, were as follows: To John Connor for $647\frac{20}{100}$ acres of land, (Record, p. 87;) to Ne-con-he-con for 332 acres, (p. 88,) and to Henry Tiblow for $329\frac{29}{100}$ acres, (p. 89.) On the 12th of February these persons conveyed, by separate deeds, the lands so patented to them, to James C. Stone, the defendant.—(Record, pp. 24 to 30.)

Secretary of the Interior decides patents void, June 11, 1862.

On the 11th of June, 1862, the Secretary of the Interior decided that the said patents had been issued without legal authority, and were therefore void; and he thereby revoked and cancelled them, and declared them null and void; and on the 16th of July, 1862, the Commissioner of the General Land Office certified the said cancellation for record in the county in which the lands therein

described are situated.—(Record, pp. 42, 43.) In his letter to the Commissioner of the General Land Office the Secretary of the Interior says: "These patents were executed without the knowledge of this department, and without any authority from me; and, until the day on which your letter bears date," (June 2, 1862,) "I had no information that such patents had been issued. The grantees named in the patents had no title to, or right, claim, or interest in, said lands; they had no authority to select the said lands under or by virtue of any provision contained in said treaty."—(Record, pp. 32, 33.)

Connor, &c., to Secretary of Interior, June 10, 1862.

By letters of June 10, 1862, to the Secretary of the Interior, John Connor and Ne-con-he-con severally declare that they never selected said lands, nor requested nor received a patent therefor, and desired that the same should be rescinded and cancelled, as they did not wish to select said land under the said treaty.—(Record, pp. 33, 34.)

Patents not delivered to, nor selections made by them.

It is alleged in the bill, and admitted in the answer, (Record, pp. 15, 16,) that these patents were never personally delivered to the parties in whose names they were issued, and that the said parties did not themselves select the lands therein described, or request that the said patents should be issued, except in the manner before stated, viz: by the sale of their claims as "floats" in 1861.

Lands patented not in Indian reserve of 1854.

It is also admitted in the answer that the lands described in the said patents are not part of the permanent home reserved for the Delaware Indians by the treaty of May 6, 1854, but that they are situated between six and seven miles north of the north boundary of the said permanent home.—(Record, p. 15.)

Their situation.

The tracts described in the patents lie adjoining each other within the lines of the surveys of McCoy, in 1830; Johnson, in 1839, and Hunt, in 1854, being between the southern boundary line of said surveys and Fort Leavenworth, as will be seen on the map marked M. It is, therefore, alleged by the United States that they are located on the military reservation of Fort Leavenworth.

Decree of circuit court.

On the 7th of November, 1862, the circuit court decreed that the said patents be set aside, cancelled and declared null and void, &c., and that said James C. Stone deliver up the said patents to the clerk of the court, &c., (Record, p. 90,) from which decree the said Stone appealed to this court.

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ARGUMENT FOR APPELLEE.

In support of the decree of the circuit court setting aside these patents, we submit three main propositions, which will be stated and considered in order.

FIRST PROPOSITION.

The 7th article of the Delaware treaty of 30th May, 1860, conferred on John Connor and other chiefs therein named, the right to select their respective portions of land from the body of land reserved to the tribe for its "permanent home," by the treaty of May 6, 1854, and from that body of land only, and therefore any selection made, even by themselves in good faith, outside of that permanent home, on the lands granted to the tribe by the supplemental article of the 24th of September, 1829, and afterwards ceded to the United States in trust for the tribe by the treaty of May 6, 1854, would be unauthorized and void.

The supplemental article of 1829 granted the Delawares, for permanent residence, the country in the forks of the Kansas and Missouri rivers, extending up the Kansas to the Kansas line, and up the Missouri to Camp Leavenworth, and thence by a westward line to a point ten miles north of the Kansas line. But, by the treaty of 1854, the Delawares relinquished all of this country except, first, a part of it sold to the Wyandotts in July, 1848; and second, "that part of said country lying east and south of a line beginning at a point on the line between the land of the Delawares and the half-breed Kansas, forty miles in a direct line west of the boundary between the Delawares and Wyandotts; thence north ten miles; thence in an easterly course to a point on the south bank of Big Island creek, which shall also be on the bank of the Missouri river, where the usual high-water line of said creek intersects the high-water line of said river." This second exception describes the permanent home left to the Delawares by the treaty of 1854. Accordingly, within these boundaries, after that treaty, they resided; and in pursuance of its other provisions, the relinquished country, up to the line of the Fort Leavenworth military reservation as run by McCoy and Hunt on the south, and by Hunt on the west, was surveyed and sold by the United States for the benefit of the Delaware tribe. And this was in obedience to, and in accordance with, the well-settled policy of the United States to extinguish the title of the Indians to their lands and open them for settlement and cultivation by white men, when the tide of emigration had reached those lands, and at the same time to secure to the Indians a separate home, where, apart from the white settlers, they might live by themselves. The clear purpose of the treaty was to secure the removal of the Indians to the portion of the country it reserved to them, to the end that the relinquished part might be opened by survey and sale under the laws respecting public lands to "speedy settlement."

The treaty of 1854 having thus limited and designated the country reserved for the home of the Indians, the treaty of 1860 provided for the disposal of that

country. This reservation, called in the treaty the "permanent home" of the tribe, was the whole subject-matter of that treaty. It provided for the survey of the reservation and the subdivision "of a portion" of it into tracts of eighty acres each, to be assigned in severalty to the members of the tribe, and to be "made in a compact body." Certificates of title for these tracts were to be issued to the persons to whom they were assigned respectively, and the tracts were set apart for the "exclusive" use and benefit of the assignees and their heirs, without the power of alienage, except to the United States or to members of the Delaware tribe. Careful provision is made (Article 5) to reserve ground for the mill, the school-house and the store, as well as for the council and agency houses and the churches. Then follows the seventh article, before quoted, under which the defendant claims title. Adhering to the policy evident in the clauses referred to, it *agrees* that the chiefs and interpreter of the tribe, in consideration of their long and faithful services, shall have *allotted* to each a tract of land to be selected by themselves, and receive a patent in fee simple therefore, &c.; the lines of each tract to conform to the legal subdivisions of survey.

The whole treaty exhibits a clear and unmistakable purpose to set apart, in a compact form, a portion of the reservation, where the Indians should not only be secured in their homes and protected from intrusion by the settlers, but, where they should live together, without exposure to the dangers of separation from each other, and the consequent necessity of intercourse with the settlers. And this purpose is as evident in the grant to the chiefs and interpreter as in the rest of the treaty; for, if it designed to secure separate and contiguous homes to the body of the tribe, it could not have intended that the homes given to the chiefs and interpreter should be so far removed therefrom that they might even locate them outside of the reservation, which would involve the necessity of absolute separation from the tribe in order to reside on them.

But a careful reading of the treaty, and especially of the seventh article, shows clearly the intention that the right of selection granted by that article was to be exercised within the limits of the reservation, which was the home of the tribe and the subject-matter of the treaty.

The third article provides for giving the Leavenworth, Pawnee, and Western Railroad Company the preference of purchasing the remainder of their lands, "after the tracts in severalty *and those for the special objects therein named* shall have been *selected* and set apart;" obviously referring to the right of selection conferred on the chiefs, &c., in the seventh article.

For the consideration stated in the seventh article, viz: the long and faithful services of the chiefs and interpreter of the Delaware nation, it was *agreed* that the said chiefs and interpreter should have *allotted* to each a tract of land to be selected by themselves, &c., the lines of each tract to conform to the legal subdivisions of survey.

Each of these clauses shows a plain intent to limit this selection to the reservation owned by the tribe. The stipulation is not a grant by the United States of the right of selection, as it would have been if the United States had meant

to confer that right of selection out of lands it owned or controlled, but it is an *agreement* with the tribe that the chiefs shall have *allotted*, &c. Why make the tribe parties to an agreement for the benefit of the chiefs, if the United States, and not the tribe, were to provide the land? By this agreement the United States secured this concession from the tribe for the chiefs. And the concession was made, not for any consideration of benefit to the United States, but for the long and faithful services of the chiefs, &c., which, of course, were services to the Delaware nation.

Again, the tracts to be selected by the chiefs, &c., were to be *allotted* to each. An allotment, both in legal and ordinary language, implies a distribution of that in which the parties have a common interest; and it utterly excludes the idea of a grant out of land to which the tribe had long before relinquished all right, except such as they retained in the purchase money.

Again, the clause that the lines of the tracts selected by the chiefs were "to conform to the legal subdivisions of survey," obviously refers to the subdivisions of the survey for which the treaty provides in the first article, and which requires the eighty acres assigned to each member of the tribe "to be selected according to the legal subdivisions of survey."

These illustrations, out of many which a critical analysis of the treaty will furnish, are quite at war with any construction which finds authority in the treaty to select the allotted lands outside of the reservation within which the tribe then had their home.

But that construction must be rejected, because it throws open the whole domain of the public lands for the selection of these tracts. The appellant relies on it to sustain his claim to lands which he admits are not within the reservation of 1854, but which he says are within the original grant of 1829 to the Delawares. But nothing in the treaty of 1860 can be cited to show an intent to authorize the selection outside of the reservation of 1854, and within the rest of the grant of 1829, which will not equally authorize the selection on any portion of the surveyed public lands outside of the grant of 1829. If the treaty of 1860 meant to allow the chiefs to select lands for their homes away from the homes it fixed for their people, why limit the selection to the country granted them in 1829? Why not give them the wide range of the surveyed lands for a choice? Surely it will not be said that the treaty intended this. And yet this result necessarily follows if any construction be given it which allows the selection to be made outside of the reservation of 1854. To reject this result is to accept the construction which limits the selection to that reservation.

The treaty of 1860, like all former treaties with the Delawares, conforming to the unvarying practice and policy of our government towards the Indian tribes, sought to secure for them a separate home as a nation; not to open the way for their dispersion and consequent destruction by removing to other places their long-trusted chiefs. It treats with them as a "nation," which "word," says Chief Justice Marshall, in Worcester *vs.* State of Georgia, 6 Peters, 558,

"means a people distinct from others." Any grant of land, therefore, made to any individuals of the nation by the treaty, even if there be no designation to fix its location, should be construed to mean the land of the nation itself, for so only will it accord with the policy of the treaty.

If, then, the right of selection conferred on the chiefs, &c., by the seventh article referred and was limited to the permanent home reserved by the treaty of 1854, it follows that, as the selections were actually made "six or seven miles north of the north boundary of said permanent home," (see answer, page 15 of Record,) those selections were without authority of law, and they and the patents issued thereon are void.

SECOND PROPOSITION.

But even if the right of selection under the 7th article of the treaty of 1860 *was not confined to the limits of the "permanent home" of the tribe reserved by the treaty of* 1854, *but extended over the whole country granted by the supplemental article of* 1829, *still, the selections made, and the patents issued thereon, were unauthorized and void, because, by that article the United States did not intend to grant any part of the land actually occupied or proper to be included in the "permanent cantonment" or military reservation of Camp Leavenworth; and, by the survey under the treaty made by McCoy, in* 1830, *with the consent of the authorized agent of the tribe, which designated the extent of the grant, the land from which the selections were made was actually excluded from the grant, and never constituted a part of it, but was set apart as a reservation for military purposes.*

The grant made by the supplemental article of 24th September, 1829, (7 Statutes, 327,) was in these words: "That the country in the fork of the Kansas and Missouri rivers, extending up the Kansas river to the Kansas line, *and up the Missouri river to Camp Leavenworth, and thence* by a line drawn westwardly, leaving a space ten miles wide north of the Kansas boundary line for an outlet."

The grant, of course, intended to exclude "Camp Leavenworth," which was designated as the point up *to* which the line on the Missouri river was to run, and from which the northern line was to diverge westwardly. The question, then, is, what was the true southern boundary of the military reservation of Camp Leavenworth?

Having been directed by the commanding general of the army to select "such position as, in his judgment, was best calculated for the site of a permanent cantonment," Colonel Leavenworth, on the 4th of May, 1827, selected the place where Fort Leavenworth now stands, and reported it as "a very good site for a cantonment," possessing, "in addition to the advantage of being on the same side of the Missouri as the road to Santa Fé," "*the very material one of having a dry and rolling country on the south and southwest of it.*" Although his order intended that the selection should be made on the left bank of

the Missouri, yet on the 19th September, 1827, the adjutant general approved the selection made on the right bank, "for the reasons assigned by the colonel in his report of the 8th of May."—(Record, 49.) Temporary quarters for troops were erected, and from that time until the present the place first called Camp Leavenworth, and since called Fort Leavenworth, has been held as a military post by the United States, except that from the 5th of June until the 8th of November, 1829, no troops occupied the buildings.—(Record, 31.) The lands around the buildings, within what we claim, but the appellant denies, to be the military reservation, were used by the forces at the camp "for purposes of pasturage and farming."—(Record, 9.)

The resolution of the Senate ratifying the treaty passed 29th May, 1830, (quoted in Record, page 56, and referred to in the President's proclamation of the treaty, 8 Davis's Laws U. S., 1072,) having provided that the President should employ a surveyor to run the lines of the country by the treaty granted to the Delawares, in the presence of an agent to be designated by them, the Secretary of War, on the 30th of June, 1830, by authority of the President, employed the Rev. Isaac McCoy to make the survey, referring "the execution of the trust" to him, and directing him to be governed by the provisions of the treaty and the resolution of the Senate.—(Record, 60.) On the 19th of July, following, McCoy began the survey, accompanied by Captain Quick, the chosen agent of the Delawares, and completed it during that summer.—(See his report, Record, 57, and map "F.") When he reached the neighborhood of Cantonment Leavenworth, with the cordial acquiescence of the Delaware agent, he diverged from the river below the camp, making an offset, marked on the map south 8° west, four miles, and north 3° west, three miles, which designated the exterior lines of the land left by him as the reservation for military purposes at that place. This land was excluded by him from the survey of the grant to the Delawares, with the consent of their agent.

We therefore contend, 1st, that the land so excluded never was part of the grant to the Delawares under the treaty of 1829; 2d, that it was lawfully appropriated to the public service for military purposes at the date of the treaty of 1829; and McCoy's survey was a competent and binding designation of the line which separated that appropriation from the grant to the Delawares.

If the first of these propositions be true, it is quite a sufficient answer to the appellant's claim to the lands in question, since he rests his right thereto on the assumption that they are within the grant to the Delawares; but it is conceived that both are true, and if true, they utterly destroy all ground of right to make the selections under the 7th article of the treaty of 1860 of the lands in question.

In support of them, we assume that McCoy's survey of 1830, made under the authority and in pursuance of the terms of the treaty of 1829, and the resolution of the Senate ratifying it, was a valid and binding designation of the country granted to the Delawares by the treaty. He was the authorized agent, chosen by the President under the resolution, to make the survey for which it provided. He performed his work in full and substantial compliance with the terms of the treaty and the resolution, and in the presence and with the approval of the agents of the tribe. He fully reported his proceedings to the Secretary of War, the

minister of the President in charge of this branch of executive duty, who had authorized him to make the survey; and the map of his survey, with the lines as he ran them, taken from the records of the government, (map "F,") is in evidence in this case. Whether his proceedings, so reported, received the formal approval of the President, as directed by the resolution, does not appear in evidence, though it may fairly be presumed it did, for no reason is apparent why it should have been withheld. The condition on which he was to approve them, viz, that he should be satisfied they were concurred in by the agent of the Delawares, was fulfilled, as appears by the extracts given from McCoy's report.

The President's approval of the survey ought also to be presumed, because no other survey of the Delaware grant, under the resolution or otherwise, was afterwards made; but the Delawares took possession under this survey, and held according to its lines. *They* never objected to it during their twenty-five years of actual possession under it.

It is submitted that McCoy having performed his whole duty with the approval of the Delawares, who took and held possession without question under his survey, and the United States having acquiesced therein by never making any other survey, and by recognizing and protecting the Delawares in their possession thereunder, his proceedings must now be accepted "as binding and conclusive upon the respective parties to the foregoing treaty," under the terms of the Senate resolution, even if the President failed to indorse the technical approval "by his signature and seal of office," as directed by the resolution.

But whatever form of legal recognition McCoy's survey may have wanted, was fully supplied by the subsequent action of the treaty-making power.

By the treaty of 24th October, 1832, with the Kickapoos, (7 Stat., 391,) the United States assigned to that tribe, as their permanent residence, as follows: "Beginning *on the Delaware line six miles westwardly of Fort Leavenworth; thence with the Delaware line westwardly sixty miles;* thence north twenty miles; thence in a direct line to the west bank of the Missouri at a point twenty-six miles north of Fort Leavenworth; thence down the west bank of the Missouri river *to a point six miles nearly northwest of Fort Leavenworth;* and thence to the beginning."

It having been agreed that parties to be chosen might alter these boundaries, a supplemental article was made 26th November, 1832, by which it was agreed that the boundary lines of the lands assigned to the Kickapoos should "begin *on the Delaware line where said line crosses the left branch of Salt creek;* thence down said creek to the Missouri river; thence up the Missouri river thirty miles, when measured on a straight line; thence westwardly *to a point twenty miles from the Delaware line,* so as to include in the lands assigned to the Kickapoos at least twelve hundred square miles."

These provisions are not only a recognition of the Delaware lines as run by McCoy, but an express adoption as a base line of the very line now contested by the appellant.

This survey is also impliedly recognized in the treaty with the Delawares of 11th July, 1854, before cited.

These repeated and solemn recognitions of the survey and of its different lines

concur in establishing its validity *as a whole;* and being so established, it cannot be repudiated in any of its parts.

But the evidence of the recognition and adoption by the executive department of the short line starting from the Missouri river below Camp Leavenworth, so as to exclude from the survey the military reservation, (and being its southern boundary,) is equally strong and conclusive.

In 1839 a survey of the military tract about Fort Leavenworth was made by Captain Johnson, under the orders of the commanding officer, and a map thereof made and duly filed in the War Department, from which map the southern boundary of the said military tract appears as run by McCoy in 1830.—(Rec., 31.)

In 1854, when making a survey, under orders from the Secretary of War, for a reservation "including the buildings and improvements and so much land as may be necessary for military purposes at Fort Leavenworth," Captain Hunt adopted the southern boundary as run by McCoy in 1830, (with a slight offset to include improvements,) commencing at the same point.—(Rec., 52.) His survey (which includes in the reservation the lands in question) was approved, and the land therein embraced formally reserved for military purposes by the President of the United States.

That the War Department always made claim to and held the land on the south side of the fort is shown by the letter of the Secretary of War, dated 27th January, 1855, (Rec., 61–62,) in reply to a claim, then first made by the Commissioner of Indian Affairs, that this land was within the Delaware grant. He states that "Cantonment Leavenworth" was a military post some years before the Delawares had, by treaty, a home assigned to them in the adjacent country; that it was not the intention of the government to remove or curtail the military establishment, or to dispossess it of such contiguous lands as had been used or were necessary for military purposes. It was not an enclosed military work, but a collection of temporary buildings for troops without regularity, and at such intervals that some of them are at least *two miles* from the flagstaff. *If the Delaware line had been run as claimed, it would not only have cut off the most important and essential portion of the land pertaining to the post, but many of its buildings also, which would have been an advance of the Indian boundary not "to," (as the treaty required,) but through Cantonment Leavenworth.* He states that the government contemplated no such result, nor the Delawares, as they acquiesced in McCoy's survey.

That the Interior Department, embracing both the Land and Indian bureaus, recognized this line as run by McCoy, is proved by the fact that the surveys of the Delaware lands, under the treaty of 1854, (supra.) are made up to this line; and the fact that, in 1861, Secretary Smith, overruling his predecessors, ordered surveys to be made north of that line, does not weaken the significance of that recognition.

These facts conclusively prove such a recognition and adoption of the survey of 1830, and especially of that part of its northern line which starts from the Missouri and excludes the military reservation, that its validity and binding force cannot now be questioned.

It may be said that it can have no such validity against the words of the

treaty of 1829, the right of the Delawares to the land depending, not on the survey, but on the treaty. But the answer is:

That the survey conforms to the words of the treaty. The line was to run up the Missouri "*to*" Camp Leavenworth, and the treaty did not attempt to designate the site of the camp. That was a question of fact to be ascertained and determined by the United States, which had the absolute right, as owner of the land, to say how far its selected military camp should extend. The proper person to decide that question was the authorized surveyor, who, in the presence and with the sanction of the Indian agent, was designating on the land the vague boundaries fixed by the treaty. Surely that designation, acquiesced in by both parties without question for twenty-five years, and sanctioned by treaties, should be accepted as an authoritative construction of the meaning of the treaty as to the point on the river at which the line should diverge westwardly. The action of the surveyor is now to be taken as part of the treaty itself.

The survey being then a valid and binding designation of the grant to the Delawares, the land excluded for military purposes was never part of that grant.

But the land so excluded was, at the date of the treaty of 1829, actually and lawfully appropriated to the public service for military purposes, and McCoy's survey was a competent and binding designation of the line which separated that appropriation from the grant to the Delawares.

The appropriation of this land for military purposes was effected by the selection of a site for a "permanent cantonment," and the possession taken thereof by Colonel Leavenworth in 1827, under the orders, and with the subsequent approval of the War Department, as before stated. By this act, and the subsequent erection of buildings and continued occupancy, the place called Cantonment or Camp Leavenworth became a lawful reservation for military purposes.

By act of 3d May, 1798, an appropriation was made to enable the President to erect fortifications in such places as the public safety should, in his opinion, require.

By act of 21st of April, 1806, the President was authorized to establish trading houses at such posts and places on the frontier, or in the Indian country, on either or both sides of the Mississippi river, as he should judge most convenient for carrying on trade with the Indians.

And by act of June 14, 1809, (2 Statutes, 547,) he was authorized to erect such fortifications as might, in his opinion, be necessary for the protection of the northern and western frontiers.

By these acts the erection of fortifications and the selection of sites therefor are authorized, and the power to make the selections and erect the buildings is committed to the President, whose selection, when made, has the same legal validity as if the act had been done by express enactment of Congress.—(Wilcox *vs.* Jackson, 13 Pet., 512.) And where the selection is made under the direction of the Secretary of War, it is presumed to be the act of the President, whose minister he is for such purposes.—(*Ibid.*, 513.)

Many instances of selections of sites for military purposes under the authority

of these acts have occurred, among which those of Fort Dearborn and Rock island are prominent, both of them having received judicial sanction.—(Wilcox *vs.* Jackson, supra; U. S. *vs.* Railroad Bridge, 6 McLean, 527.)

The authority given by these acts was, of course, to make the selections from and erect the necessary buildings on the public lands of the United States; and when any portion of the public lands was so appropriated and used, it was called a military reservation, and was regarded as set apart from the body of the public lands, and exempt from pre-emption or sale. The purpose of the acts cited was to secure the erection of suitable fortifications and military posts on the frontier. There were few or no settlers, and the public lands had not been surveyed. As, by the location of these military posts, no rights to the public lands could then be infringed, there was no occasion to designate the boundaries of the land appropriated to military use by survey on the ground. But the very fact that they were frontier posts, made it necessary that the military authorities should appropriate and use a large body of land around the buildings. For they had to depend on that land for many of their supplies, and they used it not only for parade and drill ground, but for farming and pasturage.

When, therefore, McCoy made the survey of 1830, he stopped short on the Missouri river, at a point below the buildings of Camp Leavenworth, from whence he diverged westwardly, so as to leave for the military post the land necessary for its use.

We contend that this must now be accepted as a competent and binding designation of the extent of the military reservation.

No law, or even uniform practice, has ever fixed a method by which the limits of a military reservation out of the public lands must be ascertained and marked. Each reservation has been designated in its own way, and some of them, as that of Rock island, have never been surveyed at all. The survey of the exterior lines of the reservation of Camp Leavenworth, by McCoy, has more of legal form and authority, as a designation of the reserve, than that of many others.

He was the authorized agent of the War Department, and performing a work specially committed to the charge of the President by law. He made report to the Secretary of War, and his work was duly filed. His survey was never disapproved, but, on the contrary, the War Department always recognized his southern line of the reserve as the true one. The military authorities, long after the Indians were in possession of their grant, held and used the land up to that line, their cultivated farm extending up to, and indeed beyond it, and some of their buildings being erected near it. In 1839 and 1854 the survey of the reservation adopted that line, and the War Department never ceased to claim thereto.—(See letter of Secretary of War, Record, 45.) The formal reservation in 1854 was an act of the highest executive authority in recognition of the validity of this line as run by McCoy.

This court, in the case of Mitchell *et al. vs.* U. S., 9 Pet., 761, 762, directed that where the boundaries of land, ceded by the Indians to the king of Spain in

Florida for the erection of a fort, could not be ascertained, the adjacent lands, which were considered and held by the Spanish government, or the commandant of the post, as annexed to the fortress for military purposes, should be reserved with the fortress for the use of the United States; that if no evidence could be obtained to designate the extent of the adjacent lands which were considered as annexed to the fortress, then so much land should be comprehended in the reservation as, according to the military usage, was generally attached to forts in Florida or the adjacent colonies. And if no such military usage could be proved, then it was ordered that the reservation consist of the land embraced within certain lines extending from the point of junction of two rivers *three miles* up both of said rivers.

The superior court of Middle Florida, to whom this order was directed, having, in obedience thereto, made the necessary inquiries, decided that the extent of lands adjacent to forts in Florida, where such were usually attached to such forts, was determined by a radius of fifteen hundred Castilian varas, from the salient angles of the covered way all around the walls, and, on there being no covered way, from the extreme line of the ditch; and the court decreed the extent of the land reserved for the United States, round the fort of St. Mark's, in conformity with this opinion, which decree was confirmed by this court.—(Mitchell *et al. vs.* U. S., 15 Pet., 52.)

Five thousand Castilian varas make a league, and are equal in length to four thousand six hundred and thirty-five English yards.—(15 Pet., 57.) Fifteen hundred varas, lineal measure, are, therefore, equal to thirteen hundred and ninety and a half yards, or a fraction over $\frac{3}{4}$ of an English mile.

Attorney General Butler, who argued the case in 9 Peters for the United States, suggests (3 Op. Att'y General, 110) that the length of three miles was probably selected, because generally considered the extreme distance to which a cannon shot can be thrown. In the opinion referred to he advises the application of the rule laid down by the court in the decree in 9 Peters, in ascertaining the extent of other unsurveyed reservations out of the public lands for military purposes.

In the case of the military reservation on Rock island, the Attorney late General also adopted that rule, (Man. Op. Att'y General Bates, 8 Nov., 1862.)

Tested by the principles of these cases, McCoy's survey (especially its southern line) must be sustained. Even if it be not an authorized survey of the military reservation, it is certain that not only the commandants at Fort Leavenworth, but the War Department, always held the land to the southern line of that survey, and considered it annexed to the fort for military purposes. It was so improved and used by them.

If the rule be that the reservation should extend three miles around the fort, McCoy has kept within those limits. And whether that distance was fixed by the supposed length to which a cannon shot could be thrown or not, it is clear that it was wisely adopted to protect military fortifications from enroachments like that in the present case, which actually takes part of the necessary buildings of the fort.

THIRD PROPOSITION.

But conceding that the chiefs and interpreter named in the 7th article of the treaty of 1860 *could exercise their right of selection outside of the Delaware reservation under the treaty of* 1854, *and within the limits of the military reservation as set apart by McCoy, still the right of selection was a personal right conferred on themselves only, which they could not transfer to others.*

The 7th article expressly stipulates that the lands to be allotted to them shall be "selected by themselves."

Even if the grant were of the land by specific description, in the absence of words implying a right of alienation, it is far from certain that the land granted would be alienable. For the whole scope of the treaty shows that one of its main purposes was to secure a permanent home to the tribe of which they were chiefs, and the 2d article expressly prohibits the alienation of the eighty-acre tracts granted to the tribe, except in the manner designated.

But it is only after they have themselves made the selection that the land selected is to be allotted to them and they are to receive a patent in fee simple. Until they have exercised this personal right, they have acquired no interest in any land, either equitable or legal, which they can transfer. Any other construction is inconsistent with the object of the treaty and with the obligation of protection from wrong and fraud, which the United States has always admitted it owed to the Indians.

The facts of this case show the propriety of this construction. Although the appellant by some means obtained from John Connor, Ne-con-he-con and Tiblow transfers of their right of selection, and subsequently of their supposed rights under the patents, it is evident that some imposition was practiced on at least two of them, for Connor and Ne-con-he-con, on the 10th of June, 1862, declare that they never selected the lands under the treaty, nor requested patents to issue therefor, and that the patents were not delivered to them.

When the fact that patents had been issued on these pretended selections came to the knowledge of the Secretary of the Interior, he declared that they had been issued without legal authority, and revoked and concelled them.

Without affirming the power of the Secretary of the Interior to revoke patents lawfully issued, his action in the premises proves clearly that the selections were made, and the patents issued in a clandestine and unauthorized manner, without the knowledge or consent of the officers charged by law with the supervision of the public lands and the issuing of patents.

It is also evident that these patents were never delivered to the persons in whose names they were issued.

It is beyond question that if all the facts had been known to the Secretary of the Interior and the President, the patents would never have been issued; and when they became known, the Secretary immediately took all the measures at

his command to rescind and avoid them. They were issued in clear mistake of fact and of law, and under circumstances which raise a strong presumption of fraud, not only on the Indian patentees, whose names were used, but on the officers in charge of the public lands.

FOURTH PROPOSITION.

If the selections made by Stone, on which the patents issued, were unauthorized by law, on any of the grounds stated, it follows that the patents are inoperative to convey any title, and it was competent for the circuit court, on the application of the United States, by bill in equity, to decree that they be cancelled and delivered back to the proper officers.

This court has settled, by a long line of decisions, that the issuing of a patent for public lands is a ministerial act, which must be performed according to law, and that where it has been issued, whether fraudulently or not, *without authority of law*, it is void.—(Stoddard *vs.* Chambers, 2 How., 284; Minter *vs.* Crommelin, 18 How., 87; Brush *vs.* Ware, 15 Pet., 93; Danforth *vs.* Wear, 9 Wheat., 693; Patterson *vs.* Jenks, 2 Pet., 235.) And such patents have been repeatedly declared void, both at law and in equity, although, as Chief Justice Marshall says, "a court of equity is better adapted to the purpose than a court of law." Polk *vs.* Wendell, 9 Cranch, 98; Hoofnagle *vs.* Anderson, 7 Wheat., 214; Cunningham *vs.* Ashley, 14, How., 389; Lindsey *vs.* Miller, 6 Pet., 674; Brown *vs.* Clements, 3 How., 667; Ladiga *vs.* Roland, 5 How., 581; where an act of the President, under a special authority by treaty in disposing of Indian lands, was declared void for not conforming to the treaty is, in principle, much like the present case. The latter cases are cited by Mr. Justice Miller, in Lindsey *vs.* Hawes, 2 Black, 558, and by Mr. Justice Nelson, in Minnesota *vs.* Bachelder, decided at the present term. 1 Wallace 109.

These cases variously illustrate the power of the courts to avoid patents and other evidences of title acquired by fraud or mistake, or without authority of law, to the injury of private interests.

Where the United States is the party injured, as in this case, these principles are equally available for her relief. True, the patents were issued by her officer, but she is not bound by their unauthorized acts. They can bind her only within the scope of their lawful authority.—(Johnson *vs.* United States, 5 Mason, 440; The Margaretta, 2 Gal., 515.)

The appropriate remedy of the United States to set aside and cancel patents issued by her officers, without due legal authority, is by bill in equity in the courts of the United States for that purpose. "In England, a bill in equity lies to set aside letters patent obtained from the King by fraud, (Attorney General *vs.* Vernon, 1 Ver., 277-370,) and it would in the United States, but it is a question exclusively between the sovereignty making the grant and the grantee."—(Field *vs.* Seabury, 19 How., 332; Mr. Justice Wayne.)

In Jackson *vs.* Lawton, (10 Johns., 24,) Kent, Chief Justice, says, that the general rule is, that letters patent can only be avoided in chancery by a writ of *scire facias* sued out on the part of the government, or by some individual prosecuting in its name. "The English practice of suing out a *scire facias* by the first patentee may have grown out of the rights of the prerogative, and it ceases to be applicable with us. * * In addition to the remedy by *scire faciua*, &c., there is another by bill in the equity side of the court of chancery. Such a bill was sustained in the case of the Attorney General *vs.* Vernon, (1 Ver., 277,) to set aside letters patent obtained by fraud, and they were set aside by a decree." (*Ibid.*, 25.)

The application to the circuit court, by bill in equity in the name of the United States, and at the instance of the Executive thereof, to set aside and cancel the patents unlawfully issued in the name of John Connor and others, but for the benefit of James C. Stone, the appellant in this case, was therefore right and proper, and the decree of that court should be affirmed.

~~EDWARD BATES,~~
~~*Attorney General.*~~

TITIAN J. COFFEY,
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